Dckt No. 101 – Declaration of Derek A. Newman in Support of Defendants' Motion for Summary Judgment

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES S. GORDON, Jr., a married individual, d/b/a 'GORDONWORKS.COM'; OMNI INNOVATIONS, LLC., a Washington limited liability company, Plaintiffs, v. VIRTUMUNDO, INC, a Delaware corporation d/b/a ADNOWLEDGEMAIL.COM; ADKNOWLEDGE, INC., a Delaware corporation, d/b/a ADKNOWLEDGEMAIL.COM; SCOTT LYNN, an individual; and JOHN DOES, 1-X, Defendants.	NO. CV06-0204JCC **DECLARATION OF DEREK A. NEWMAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** NOTE ON MOTION CALENDAR: February 16, 2007

I, Derek A. Newman, swear under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for defendants Virtumundo, Inc. ("Virtumundo") and Adknowledge, Inc. ("Adknowledge"), am over age 18, and competent to be a witness. I am making this Declaration based on facts within my own personal knowledge.

2. Attached hereto as Exhibit A is a true and accurate copy of the Deposition of James S. Gordon, Jr.

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

I certify and declare under the penalty of perjury under the laws of the State of Washington and the United States that to my knowledge the foregoing is true and correct.

Executed on this 22nd day of January, 2007, at Seattle, Washington.

Derek A. Newman

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
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EXHIBIT A

Transcript of the Deposition of James Gordon, Jr., Plaintiff

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

Transcript of James S. Gordon, Jr., Vol. I

Case: Gordon v. Virtumundo

Date: January 9, 2007

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

JAMES S. GORDON, JR., a)
married individual, d/b/a)
'GORDONWORKS.COM'; OMNI)
INNOVATIONS, LLC, a)
Washington limited)
liability company,)
)
Plaintiffs,)
)
vs.) No. CV06-0204JCC
)
VIRTUMUNDO, INC., a)
Delaware corporation)
d/b/a ADKNOWLEDGEMAIL.COM;)
ADKNOWLEDGE, INC., a)
Delaware corporation,)
d/b/a ADKNOWLEDGEMAIL.COM;)
SCOTT LYNN, an individual;)
and JOHN DOES, 1-X,)
)
)
Defendant.)

VIDEO DEPOSITION UPON ORAL EXAMINATION

OF

JAMES S. GORDON, JR. - VOLUME I

Taken at 505 Fifth Avenue South

Seattle, Washington

DATE TAKEN: JANUARY 9, 2007

A P P E A R A N C E S

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THE VIDEOGRAPHER:

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Buell Realtime Reporting, LLC
1411 Fourth Avenue
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* * * * *

DEPOSITION OF JAMES S. GORDON, JR. - VOLUME I

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SEATTLE, WASHINGTON; JANUARY 9, 2007

9:23 A.M.

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THE VIDEOGRAPHER: Good morning. We are now on the record. Today is January 9th, 2007. The time is now 9:23 a.m. This is the videotaped deposition of James S. Gordon, Junior, taken by the defendant in the matter of James S. Gordon, Junior, Gordonworks.com and Omni Innovations, LLC versus Virtumundo, Inc., Adknowledgemail.com, Adknowledge, Inc. and Scott Lynn filed in the district court of the -- United States District Court, Western District of Washington at Seattle, Case No. CV06-0204JCC.

This deposition is being held at the offices of Newman & Newman, 505 Fifth Avenue South, Suite 610, Seattle, Washington 98104.

My name is Albert Maimon, videographer with the firm of Buell Realtime Reporting located at 1411 Fourth Avenue, Suite 820, Seattle, Washington 98101. The court reporter today is Christine Hougen, also with the firm of Buell Realtime Reporting.

Counsel will now introduce themselves, stating whom they represent, starting with counsel for the defendant, please.

MR. NEWMAN: Good morning. Derek Newman for the defendants.

MR. SIEGEL: Good morning. Robert J. Siegel for Plaintiff Jim Gordon and Omni Innovations.

MR. GEROE: Good morning. Michael Geroe, general counsel for Defendant Adknowledge, Inc.

THE VIDEOGRAPHER: Will the court reporter please administer the oath and we will continue with the deposition.

JAMES S. GORDON, JR.,

witness herein, having been first duly sworn on oath, was examined and testified as follows:

E X A M I N A T I O N

BY MR. NEWMAN:

Q. Good morning, sir. My name is Derek Newman.

A. Morning.

Q. I represent Adknowledge, Virtumundo and Scott Lynn in a lawsuit that you have brought.

Do you understand that?

A. Yes.

Q. And today we're taking your deposition.

Do you understand that?

A. Yes, I do.

Q. Have you ever had your deposition taken before?

A. Yes, I have.
Q. How many times?
A. I'm not sure. At least once.
Q. Tell me about that time.
In other words, what was the lawsuit in which you were deposed; were you a party?
A. That was a lawsuit against Theodore Hansson.
The deposition took place in Kennewick, Washington.
Q. Were you a party in that case?
A. Plaintiff.
Q. What were the nature of the claims?
A. This was a spam lawsuit, much like this one.
Q. How did that case resolve, if it did?
A. Well, the judge dismissed it because of improper service or some term like that, and I was proceeding pro se.
So I later, within a month or so, hired Doug McKinley to represent me. And we decided not to at that time pursue Mr. Hansson. I got a chance to meet him and his wife and we talked about it, and I didn't refile.
Q. I'm going to go over the process for depositions.
A. Okay.
Q. You advised that you have been through it once before, but I think it's appropriate that we all understand what the procedure is going to be.
A. Okay.

Q. I'm going to ask you a series of questions, and it's your obligation to give to me true, accurate, forthright and honest answers.

Not only is it your obligation, but it is your right, and so I'm going to make an effort not to cut you off, I'm going to allow you to always finish your answer so that it can be full and complete, and I ask that you give me that same courtesy. Please let me finish my question before you begin your answer.

There will be times when I ask a question that you may not understand. And in those circumstances, please ask me to clarify because we want to make sure that the record is clean today.

A. Okay.

Q. Everything that you say is being taken down by this very kind stenographer, and she has a difficult job. We want to make sure that we speak slowly, clearly and audibly so that she can record everything that you and I say.

And similarly, and back to the earlier topic, we don't want to speak over each other because it's really difficult for her to write --

A. Okay.

Q. -- down things that we say simultaneously.

So let's keep that in mind.

A. Fair enough.

Q. If at any time, I ask you a question and you don't understand, you can ask me to clarify. And similarly, if later during the proceeding, you want to amend your answer, feel free to mention that you'd like to change an earlier response or amend an earlier response or add to an earlier response.

A. Okay.

Q. Your lawyer is here, Mr. Siegel --

A. Correct.

Q. -- and he's going to object to some of my questions.

That doesn't mean you shouldn't answer them. You should answer every question that I ask you unless Mr. Siegel instructs you not to answer.

And generally, the only reason why he can instruct you not to answer is because I ask a question that would infringe upon a privilege, such as the attorney-client privilege where you're asking him for legal advice or another lawyer for legal advice. I don't have a right to know what your questions in that regard are or their advice.

But other than that, I generally can ask you any questions that are likely to lead to the discovery of admissible evidence --

A. Okay.

Q. -- and I will.

And I may ask questions, and through your head, you may not know why it is likely to lead to the discovery of admissible evidence, but that doesn't mean that I can't ask it. You're required to answer every question that I ask and give me your honest and forthright response.

A. Okay.

Q. This is a deposition, not an interrogation, not an endurance test. So if at any time you would like to take a break to use the restroom, to get some water, to grab some food, catch some fresh air, please ask, and I'm going to make every effort to accommodate that because I want you to be comfortable.

Again, it's important that we have a clear record. It's important that you have a clear mind when you're testifying today, so I don't want to put any undue pressure on he. Just let me know if you need a break. The only thing that I request in that regard is that if there is a question pending, please complete your answer before taking your break.

A. Okay.

Q. And if you come back from your break and you change your answer, then I may take that opportunity to inquire as to why the answer was changed.

But you have every right to change answers, because, again, what's important that we have true accurate and correct transcript and that we get truthful and forthright answers from you to be used in this proceeding?

Do you understand all that?

A. Yes.
Q. Do you have any questions in that regard?
A. No.
Q. How old are you?
A. 55.
Q. Did you attend college?
A. Yes, I have.
Q. Where?
A. Do you want the whole list of colleges?
Q. I would appreciate that.
A. Okay.
Junior college, Oakland, California; that was Merritt Junior College.
The University of Wisconsin, Madison, Wisconsin.
City University in Richland, Washington.
And I'm presently attending Walden University. It's based in Minneapolis.
Q. Do you have a degree from the University of Wisconsin?
A. A bachelors in science and education.
Q. Do you have a degree from City University?
A. An MBA.
Q. Is Walden University a correspondence course?
A. It's a combination. Much of it's on-line, but we have certain residence requirements that I've met, and hopefully, by the end of this year, I'll have another degree.

Q. What are you studying?

A. Business. It's a self-designed course -- course of study; applied management and decision sciences.

Q. Did you attend the University of Wisconsin immediately after the junior college in Oakland?

A. Yes.

Q. And after you graduated from the University of Wisconsin, did you attend another school or did you take employment?

A. I took employment at the -- Cal Tech's jet propulsion lab in Pasadena, California.

Q. What did you do for Cal Tech?

A. The first three-plus years, I was on a management rotation program. So everything that you do in a human resource department, I think I did.

Q. How old did you hold that position at Cal Tech?

A. Four years and four months.

I did give my resume. I think.

THE WITNESS: Does the water gurgle when I'm drinking? Will it gurgle in here? Okay.

Q. Did you take employment at another company after you left Cal Tech?

A. Yes.

Q. Do you know what year you left Cal Tech?

A. It was '78, January '78.

Q. And in 1978, where did you then become employed?
A. The Washington Public Power Supply System.
Q. What was your position there?
A. Training specialist.
Q. What's a specialist?
A. I don't know how to answer that.
Q. You were training them?
A. No. My position title was a training specialist.
I conducted employment training, human resource development. That's everything from writing courses to supervisory development.
Q. How long did you hold that position?
A. For three years and -- what -- five months or so.
Q. Until approximately 1981 or '82?
A. 1981.
Q. And in 1981, did you take employment elsewhere?
A. With -- yes. With New York Life Insurance Company.
Q. What did you do for them?
A. I was in a training program, again, and became an agent and sold financial service products and did that for maybe two and a half years or so.
Q. What did you do after that?
A. I took another position with -- oh, geez. Now it's kind of foggy.
I think I went to IDS/American Express immediately

after that. Or maybe it was Consolidated Financial.

I'm not sure which of the positions I took next.

There were a series of two job -- two jobs and my first try at self-employment, and I'm just not sure what the sequence was. I'd have to go back and look.

Q. Were the jobs in financial services?

A. Yes. As well as the self-employment.

Q. And when you began self-employment, were you still employed?

A. No.

Q. So you left the firm you were with at the time and started a business?

A. Now that I think about it, it was IDS.

It was Consolidated Financial, which was a local company.

Then I went to IDS.

And then on to self-employment at that time.

Q. What year did you become self-employed?

A. 1985.

Q. And what was the nature of the business?

A. Provided information, workshops on financial products.

Helped people with credit counseling.

Produced a foreclosure newsletter.

Those types of things.

Q. You mentioned earlier a lawsuit against Mr. Hansson.

A. Yes.
Q. What year was that lawsuit?
A. I believe it was the end of '03. I believe it was December of '03.
Yes. And it was dismissed, I think, in April of '04.
Q. You testified that in 1985, you started a business where you provided information and workshops on financial products, you did credit counseling and you had a foreclosure newsletter.
What was the name of that business?
A. The Gordon Group, a d/b/a.
Q. When you say it was a d/b/a --
A. Yes?
Q. -- do you mean that it was a sole proprietorship that was called The Gordon Group?
A. Yes.
Q. And how long was The Gordon Group in business?
A. At that time, for maybe two years.
It could have been 22 months. It could have been 25 months. I'm not sure.
But, approximately.
Q. What did you do after those approximately 25 months?
A. Well, I was unemployed for a period of time. One of the reasons for getting my continued education is because I didn't really know what I was doing in terms of the business

aspect.

Unemployed for -- I don't know -- maybe six, seven months, and then I went to work for Private Industry Counseling in Kennewick.

Q. And what year was that, 1988?

A. 1988, yes. April of '88.

Q. How long were you employed there?

A. This is one of those complex answers.

The contract changed from one group to the next to the next. So there were at least three, maybe four different groups. And again, it's a matter of sequencing.

At the end of each year, the contract ended. We were laid off. Sometimes for 24 hours; other times for a week.

It was, all in all, three years or so.

Q. What was the nature of your positions there?

A. I was a training specialist.

We did what's called workforce development training.

Q. And did you leave there in approximately 1991?

A. Yes.

Q. What did you do in 1991 for employment?

A. 1991, after I was laid off, I was unemployed the rest of the year. And I had to decide what I wanted to do.

So I didn't, and I was unemployed about eight or nine months and tried other things, put together business ideas.

And I started another business, The Gordon Group. I kind of reinvented that and started, again, I think, in '92.

Q. Why were you laid off?

A. I don't know. They were running out of money. This was a local two-person shop. It was locally-granted dollars for minority economic development, and they simply ran out of money.

Q. In 1991, you testified you started a new business, called it The Gordon Group --

A. I think it was '92. It could have been the beginning of '93.

I was doing a lot of training. I came here to Seattle with the Pacific Institute, and I thought I was going to do some of their training.

I came here for maybe a full year, off and on, taking courses and so forth.

So I -- I don't know the exact starting date of The Gordon Group the second time around.

The first of '93; it could have been the end of '92.

Q. And that was the nature of the business for that Gordon Group?

A. This time I got back to what I did best, and that was training.

And I conducted workshops for the local college, Department of Energy, whoever else locally -- the City and things like that.

Q. How long did you do that for?
A. Up until, I think, 2001.
Q. From approximately 1992 or '93 until 2001 -- I'm clarifying -- you ran a business called The Gordon Group and you were a training specialist, correct?
A. Yes.
There's more than that. I can add to it, if you'd like.
Q. Please.
A. In 1997, I added something to what I was doing.
In addition to doing entrepreneur training, things like that, I started a health and nutrition business which was strictly on-line. That was in '97. And we sold health and nutrition products in eight or nine, 10 different nations.
So that's how I got this on-line presence.
So I did the two things simultaneously.
Q. Was the health and nutrition products business under a different name than The Gordon Group?
A. No. It was the same.
Q. Was it a sole proprietorship?
A. Yes.
Q. How did you come to be involved in the health and nutrition products industry?
A. A life-long allergy, and I found something to relieve the allergy symptoms, both seasonal allergy as well as food

allergy.

That something was methyl sulfinyl methane; MSM, they call it. And as a result of taking that, I had tremendous relief. Not -- it wasn't gone, but I had relief.

And people around me that knew me said, what are you doing, and as a result, I undertook that venture.

Q. Did you have partners in that venture?

A. Not until -- it was either '99 or 2000. And that partner was Dancing Wolf, Incorporated in -- I guess it was Beaverton, Oregon.

And actually, that company absorbed The Gordon Group.

Q. Where were the health and nutrition products sold?

And when I say "where," I mean what medium; the Internet, storefront or otherwise.

A. 99.9-some percent was sold via the Internet. Sold in most every state in the nation; Canada, England, Ireland, Italy, Ecuador, Australia.

There was a couple of others, but those were some of the places.

Q. Did you have employees in connection with the health and nutrition products company?

A. No. Occasionally, my son would help me and I paid him.

Q. Did you market on the Internet?

A. Yes.

Q. And who designed the Internet site --
A. I did.
Q. And how did you know how to design an Internet site?
A. I taught myself, HTML.
Q. So you designed the HTML front end for The Gordon Group website that sold health and nutrition products --
A. Yes.
Q. -- is that correct?
A. Yes.
Q. Was there a back-end infrastructure; in other words, code that drove --
A. There were no scripts.
Q. -- the purchases?
A. There were no scripts until toward the end.
I apologize for interrupting. Go ahead.
Q. Thank you. You're doing great. It's sometimes difficult when we're speaking back and forth for the court reporter, and I appreciate that.
You mentioned a moment ago that there was no scripts until later.
How were the products sold if there wasn't any back-end infrastructure and it was just a graphical interface?
Do you understand my question?
A. I'm not positive I understand it all.
You said, how were they sold?

Q. You testified that you designed the front end of this website.

A. Yes.

Q. You specifically advised it was through HTML.

A. Yes.

Q. And it's true that HTML is primarily limited to displaying images, right?

A. Yes.

Q. HTML doesn't have an interactive feature that allows purchasers to submit purchase requests and receive receipts and have credit cards billed and the like, correct?

A. That's correct.

Q. So my question is, how were purchasers able to purchase on The Gordon Group website if it was just an HTML interface?

A. Okay. Toll-free number was one way. They called a number.

We allowed them to do it via fax.

Check by phone.

And eventually, I learned how to do forms well enough to put forms on the website. And I don't know at what point we added forms.

Q. When you first started the website in around 1997, did it exist to promote the 800 number; was that the only means by which a consumer could purchase?

A. I'm not sure. I'm not sure.
Q. And at some point, consumers could purchase products on the website, correct?
A. At some point, correct.
Q. When do you believe that was?
A. I believe after we had become part of Dancing Wolf.
I just -- I'm just not certain right now.
Q. How did you promote the products on the Internet?
A. Okay. It sounded like I answered that.
Let's see.
The toll-free number was on there.
The fax number was on there for fax orders. And there was a sheet that said, this is the product number or whatever and the number of products, and they were able to fax it in or call it in. And most people called it in.
Q. Are you familiar with the term "traffic" as applied to the Internet?
A. I think I am.
Q. What is your understanding of that term?
A. People who access a website -- and I put counters on the website, and that could pull up the amount of people that actually came to the website to look.
There are click-throughs where you have some other part of it -- maybe the order forms or something like that -- you can -- you can gauge traffic just on -- on hits or you can

gauge traffic on click-throughs and things like that.

And that's my limited understanding of what we're talking about.

Q. Did you make any efforts to generate traffic to The Gordon Group website that sold the health and nutrition products?

A. I'm just trying to remember what things we did do.

I'm sure I did. Just with four hours sleep, maybe it's not coming to my mind right now.

If I'm asked that question again, maybe I'll have something.

Q. Would you like some coffee?

A. I don't drink coffee, but thank you.

Q. Did you advertise The Gordon Group website by purchasing key words or other paper-click mechanisms through a search engine?

A. This is a long time ago.

I don't know if I purchased -- well...

Again, I'm just not certain.

I'm not certain.

Q. Did you send out e-mail marketing to promote The Gordon Group website?

A. That's one thing we didn't do.

Q. Never?

A. I have no recollection of ever doing that; not for selling health and nutritional products.

Q. Did you pay anybody to market or promote The Gordon Group website?

A. No.

Unless I'm misunderstanding your term "marketing," no.

Q. Do you know how consumers that purchased The Gordon Group health and nutritional products found The Gordon Group website?

A. We didn't ask that question until very late in the game, and most people would say that they saw it in a search engine.

Now that you mention it, there was an application -- you mentioned marketing -- WebPosition, I think it was called, out of Australia, a product that I purchased, and it was supposed to be something to give you better placement in the search engines.

I think that's the marketing tool that we used. WebPosition, I think, is the name.

Q. Did you use any other marketing tools?

A. I would have to ask my old partner. I don't know if we did anything else.

I locally told people about it and brought samples. We gave away a lot of samples to people, hundreds of bottles to give them our product.

So, word of mouth.

Q. You mentioned a company in response to my question earlier about whether you had a partner.

Would you be so kind as to repeat its name?

A. Dancing Wolf, Incorporated.

Q. How did you become introduced to Dancing Wolf, Incorporated?

A. The proprietor called me. Saw my website.

Q. Did you sell an interest in the health and nutrition product business to Dancing Wolf?

A. Not technically. We -- because we were both small businesses, we just decided to combine our resources, and we redid our bylaws and things like that.

Q. Did you have a business entity formed for your health and nutrition product business at any time?

And when I say "business entity," I'm referring to a corporation, limited liability company or limited liability partnership.

A. I didn't, but she had a corporation, an Oregon-based corporation.

Q. Did she sell you interests or otherwise transfer you interests in the Oregon corporation?

A. No.

Q. Did so you never owned shares in the Oregon corporation?

A. No.

Q. In response to my question about Dancing Wolf, you testified that "she" had a corporation.

Who is "she"?

A. Her name is Darin E. Tillinghast, T-I-L-L-I-N-G-H-A-S-T.

Q. At some point, Dancing Wolf, Incorporated -- I think you testified -- swallowed up your business?

A. Yes. That's a way to put it, yes. Merger.

Q. What was the nature of that transaction?

A. Effectively, it was a merger.

When I say we combined resources, that's exactly what we did. She had a local accountant to do the paperwork and the K-1s and things like that. And I let her handle that.

Q. Were you paid for the merger?

A. Pardon?

Q. Were you compensated for the merger?

A. Technically, no.

Q. You testified "technically, no," which indicates to me there might be a practically, yes.

Is there a practical way that you were compensated, even if technically you were not?

A. Well, other than getting free product, I don't know if there's anything else.

Q. Why did you allow Dancing Wolf, Inc. to swallow up your business?

A. Well, I had done it for maybe three years, and I wanted to do something more.

The other part of that is there was a guy in Australia that wanted us to help market our product nationwide there, and he asked us to put together a marketing report. And I didn't know how to do that.

And there was a couple of other requests of that nature, and I wasn't able to fulfill my customers' request, and I decided I needed more education in business. And that's why I undertook my MBA and, effectively, withdrew from the other.

And we had an oral agreement for payment for services and things like that, and I decided I'd go ahead and start school full time. And that's what I did.

Q. What year was that?

A. 2000.

Q. Your business, The Gordon Group, was operating in 1999, correct?

A. Up through, I think -- I terminated the business, I think it was 2002.

I kept it going. Just like -- I kept interest going, but I, on a day-to-day basis, did not manage, was not involved in the daily management of the business.

Q. Do you recall the gross revenue you generated in 1999?

A. No.

If I guessed, it would be about 100-, 110,000;

something like that.

Q. Do you know what your profit was on that 100-, 110,000?

A. No, I don't.

Q. I'm looking for a best estimate because I know that you don't have your financial documents in front of you.

A. No. Even so, we were just given K-1s. And all of the accounting was done with her accountant there in Oregon.

So, no, I don't -- even the Quickbooks -- we ran across some problem in transmitting the Quickbooks so that I could keep up to date. I'm not sure what the problem is right now.

So, no, I didn't get a final because I had been involved in my MBA and I also started another job in May of 2000 working for City University.

So I had so much going on that I really didn't -- I wasn't diligent, vigilant, whatever, in terms of getting through and getting all these weekly updates and biweekly updates and so forth.

Q. Did you report income to the government in 1999?

A. Always.

Q. You don't know how much you reported?

A. No. I don't even know what I reported last year.

Q. And in the year 2000, did the health and nutrition business generate revenue for you?

A. I -- I'm sure it did. I just don't know.

The last time, though, I got a paycheck from that venture was at the end of '01.

So it continued to, you know, provide income, but I just don't know what it was.

Q. What became of the business?

A. I believe it's still going.

Q. But you don't generate revenue from it any longer?

A. I haven't been paid.

Q. Do you have an agreement with Dancing Wolf or Ms. Tillinghast that provides that you should be earning revenue from the health and nutrition business?

A. I have an agreement, but it's more of a nondisclosure, noncircumvention-type of agreement and there was no exit strategy included in that.

Q. Are you entitled to a percentage of the revenue that the company generates?

A. I think so.

Q. Do you know whether you own shares in the company that offers these products?

A. I didn't purchase shares originally. I think we had a split of 51/49 or 52/48 or something like that.

So, that's my best recollection. It was a pretty narrow split.

Q. You testified that you went back to study for your

MBA.

A. Yes.

Q. And that year was 2000, correct?

A. Yes.

Q. So were you in school full time at that time?

A. The first quarter, no.

But the second quarter that I was enrolled, I was full time.

Q. How did you earn a living during that time?

A. Please re- -- I -- I missed something.

Q. Okay.

You testified you went back to school, correct, in the year 2000, and you started studying full time, right?

A. Yes.

Q. And school costs money, correct?

A. Yes.

Q. And when you are in school, you are not paid for being in school, correct?

A. Yes, I was. At City University, that's who provided the education, and that was my employer as well.

Q. So you worked for City University at the time?

A. Correct. I was an academic advisor.

Q. Thank you for clarifying.

A. Okay.

Q. How long were you an academic advisor?

A. Three years and three months, two months; something like that.

Q. What were your responsibilities as an academic advisor?

A. Market the university, which I did.

And all the outlying areas in the Columbia Basin.

And to counsel, advise students on options for their academic progress.

For new people, just to tell them about the university and to follow up.

Q. You did that until approximately 2003?

A. Until the end of July 2003, yes.

Q. Did you hold other employment positions at that time?

A. Not in '03, no.

Q. Did you own any businesses at that time?

A. I thought I held interest in Dancing Wolf.

Q. Other than Dancing Wolf, did you own any businesses at that time?

A. No, I don't -- I don't think so.

Well, I formed Omni with the intention of making that my full-time occupation, but that was 2000, mid-2000. Maybe it was 2001.

Q. When you refer to Omni --

A. Omni Innovations, LLC. I apologize.

Q. And we'll just refer to that as Omni because it's probably easier for both of us.

But when either of us refer to the entity Omni, we're talking about Omni Innovations, LLC --

A. Yes.

Q. -- is that fair?

A. Yes.

Q. You formed Omni in the year 2000?

A. That's correct.

Q. Why did you form Omni?

A. I'm trying to think of the simplest way.

I have intellectual property concepts that I wanted to develop and market.

Q. What were they?

A. What I can tell you is I've developed a proprietary planning system which I will be marketing to K-20 -- kindergarten through, really, doctoral level -- a planning program where we're taking my pen and paper process and, with the help of Battelle, turn it into software.

Q. Have you ever generated any revenue from that proprietary planning system?

A. No. It's not complete.

Q. So it's still in the --

A. Drawing board.

Q. -- research and development phase?

A. Yes.

Q. Did Omni generate any revenue between the year 2000 and 2003?
A. No.
Q. Did you personally generate any revenue or income between the year 2000 and 2003, other than from City University or Dancing Wolf?
A. I don't recall any other sources.
Other than my wife working.
Q. Why did you leave City University?
And when I'm speaking of it, I'm referring to the employment position as opposed to the student position in the year 2003.
A. I was laid off in 2003.
And last year -- I'm sorry, 2005, the campus closed in the Tri Cities.
Q. After you were laid off from City University in 2003, what did you do to generate income?
A. Well, I had a lot of time to think about it.
Q. To think about generating income?
A. Well, yeah. What I attempted to do was to continue work on the software development project.
In the meanwhile, the only income that I had was unemployment until sometime in '04.
Q. When you refer to "unemployment," are you speaking of State unemployment insurance?

A. That's correct. That's correct.

Q. So your only source of income in the year 2003 was from State unemployment payments?

A. Up until my layoff at the end of July, I had a regular salary.

And after that -- I don't know -- I had a severance package plus -- oh, geez. I don't know.

It was the equivalent of six or eight weeks of pay after that. And they threw in my vacation and so forth.

So I had almost three months of pay afterwards.

Q. How long were you receiving unemployment compensation payments from the State?

A. It was until maybe mid-'04. I'm not sure when the cutoff was.

Q. Why did those unemployment compensation payments cease?

A. I don't know. I have no idea. Unless -- you know, there's only a certain amount of time that you can qualify, and I'm assuming that was the case.

Q. Were you employed in the year 2004?

A. I had no employer.

Q. Did you own a business in the year 2004?

A. Omni was the only thing that technically was formed. I kept renewing the license for it each year.

Q. Did Omni generate any revenue in 2004?

A. No. I don't believe -- no. I don't believe it did.
Q. I just want to clarify.
I used the term "revenue." I suppose a synonym for that would be "income," and I just want to make sure you understand that when I ask, I'm inquiring as to whether Omni generated any income whatsoever, gross net, in kind.
A. I would have to double-check because I did ask an accountant for help, who was actually one of the professors at City U.
So I would have to go back to whatever notes to say --
I don't think so, but I'm not absolutely positive. I don't think, at that time, it did.
Q. In 2004, did you earn any income other than from unemployment compensation from the State?
A. Did I earn any other income?
I held no job during that period of time.
Q. In 2004, did you earn any income other than from unemployment compensation from the State?
A. As I understand that, the answer is no.
Q. In 2005, did Omni generate any revenue or earn any income of any kind?
A. I think -- I think the first revenue for Omni was 2006.
I lost a lot -- in fact, I lost all of my records due to computer viruses on at least three occasions. And I've had

to, I guess, decentralize recordkeeping.

Q. In 2005, did you earn any income?

A. I'm trying to think if I did any workshops.

I don't recall anything at this point for '05.

Q. During these years when you were unemployed, how did you pay your bills?

A. Well, I mentioned that my wife was working.

During the course of the last maybe two and a half years, the lawsuits that I have been involved with yielded settlements.

Q. You testified earlier that in 2006, Omni earned its first revenue.

A. Yes.

Q. From what source did Omni earn its first revenue?

A. The first revenue came from a settlement.

Q. A settlement of what?

A. A settlement of a lawsuit.

Q. What lawsuit?

A. I -- I think that agreement's confidential. Best -- I'm not supposed to divulge that information.

Q. Are you refusing to answer the question?

A. At this point, yes.

MR. NEWMAN: Would the court reporter be so kind as to mark the record.

Q. You understand that I'm entitled to ask any question that's likely to lead to the discovery of admissible evidence, correct?

A. Yes.

Q. And here, I'm asking a question that directly relates to this case because it involves another lawsuit you brought.

Do you understand that?

A. Yes, I do.

Q. And I believe I have the right to ask this question.

Why aren't you answering it?

MR. SIEGEL: Counsel, objection. To the extent that my client may be bound by confidentiality provisions in a particular settlement agreement, then we would request time and opportunity to consult and review that -- those provisions, and we will answer if we believe that we're obligated to and you're entitled to that information and my client doesn't run afoul of the confidential provisions.

MR. NEWMAN: In this case, we have a protective order, and we agreed to it and the court signed off on it. We negotiated it.

MR. SIEGEL: That's true.

MR. NEWMAN: And it provides for when in this case the parties should disclose confidential information and how that will be maintained.

May I ask this question of this witness pursuant to the protective order and we could ask the court reporter to maintain the confidentiality of this portion of the record?

THE WITNESS: It's okay?

MR. SIEGEL: I guess so.

We do have a protective order.

THE WITNESS: Okay.

Q. I just want to make clear for the record -- and court reporter's doesn't like this very much, but we have a very good one here.

At this point, the portion of the record should remain confidential, and then, when we're done with the areas that you would like protected pursuant to the protective order, please let me know so that we can go back on to a regular transcript so as not to inconvenience the stenographer any further.

A. Okay.

[START EXCERPT]

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[END EXCERPT]

Q. What -- from what source did that revenue come that Omni earned in 2006?

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A. May I consult with my attorney?

Q. Not unless you believe the question that I'm asking you may infringe upon the attorney-client privilege.

MR. SIEGEL: You can answer the question.

THE WITNESS: This was the REDACTED matter.

It's okay?

MR. SIEGEL: Yeah.

With that said, we're going to have this portion marked as confidential pursuant to the protective order.

MR. NEWMAN: That's fair.

If the court reporter has any questions about the confidentiality, please let us know, because I anticipate we'll be doing this from time to time throughout the day.

[START EXCERPT]

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[END EXCERPT]

Q. You testified earlier that you used an ISP called One World?

A. One World Telecommunications. OWT for short.
Q. When was OWT your ISP?
A. Pardon me. I've got something in my throat.
I didn't hear the question.
Q. When was OWT your ISP?
A. I believe it was from '95 to 2000 or 2001.
Q. Why did you terminate its services?
A. Too much spam.
Q. What services did you obtain from One World, OWT?
A. The Web hosting and e-mail were the two main ones.
Q. Who provided your bandwidth at the time?
A. I believe the same company, as I understand that.
Q. Did you have your own e-mail server at the time?
A. No.
Q. Did you have any server at all at the time?
A. No. Just leased space on theirs.
Q. Did you have a website?
A. Oh, yes. I've had a website since 1996, I think.
Q. How many websites have you had since 1996?
A. Oh. I -- dozens. I don't know if it's five dozen, 100.
I've done dozens of websites for people that I know. For this Woman's Resource Center. For fraternal organizations. For church organizations. Friends. Family.
I guess -- "this organization," I should say Columbia

Basin College's Women's Resource Center.

Q. After you terminated One World, do you recall which ISP you engaged next?

A. I think it was Earthlink. I'm not positive, but I think it was Earthlink next.

Q. What services did Earthlink provide for you?

A. Geez, I'm not sure.

I had two ISPs, effectively, for a long period of time -- actually, several years -- so I'm not sure who did what.

Q. What were the two ISPs?

A. Well, at first it was -- at first it was One World. I had them for five or six years.

And then I went to Earthlink.

And then, I think, after that, I went to ValueWeb.

I'm -- it's not clear, but I had two at the same time for, as I said, maybe two years.

Q. Why did you have two?

A. I wasn't happy with, again, the spam problem. I had -- trying to check one solution versus others, trying to learn what worked best.

That's my best recollection. I just -- I had spam. I terminated at least three companies strictly because of spam. Maybe four.

Q. Did Earthlink provide a spam filter?

A. Yes.

Q. And you utilized it?
A. Yes. But it was very ineffective.
Of course, that may say a lot about my technical expertise, but it was ineffective.
Q. What services did Earthlink provide for you?
A. I'm not certain. I just don't recall which services.
Q. Spam filtering services?
MR. SIEGEL: Objection. Asked and answered.
A. What's next?
Q. Spam filtering services?
MR. SIEGEL: Objection. Asked and answered. He said he didn't remember, Counsel.
Q. Is that your testimony, that you don't remember?
A. I -- I don't -- the only thing that I recall -- and it must have been e-mail -- that's my summation or my guess there -- there would have been at least e-mail, but I don't remember having an Earthlink e-mail address.
So I'm really confused as to what services were provided by whom.
Q. Do you recall what services Webmasters.com provided?
A. The main thing was Web hosting.
Q. Did they provide an e-mail account?
A. Well, with the domain, you can carry as many e-mail addresses as you want with most companies. Some will have restrictions.

I think OWT had five addresses at their domain.

Q. Did Webmasters.com provide e-mail accounts to you?

A. They didn't need to.

With my domain, I can establish my own e-mail accounts.

Q. How?

A. You just point it to the e-mail -- the domain to their servers, and be "Jim@" or "James@" or something like that.

Q. Did Webmasters.com operate the mail server through which you received e-mail at that time?

A. I believe that's true.

MR. SIEGEL: What time are we at, just for clarification?

Q. What services did you receive from ValueWeb?

MR. SIEGEL: At what time, Counsel? Can I get clarification there so we know when we're talking about here?

You said, "at that time."

A. Let me go back.

ValueWeb was my Internet service provider prior to Webmasters.

And all of this took place in the window of 2000 to maybe 2004, but I just don't know with any demarkation when one started and one stopped.

Q. What services did ValueWeb provide for you?

A. Web hosting.

Q. Did ValueWeb provide e-mail accounts to you?
A. That's part of the domain, yes.
Q. Did they provide a spam filter?
A. ValueWeb.
I'm almost certain they did because that was, again, a problem that I had with terminating their service. I continued to get spam.
Q. What services did AOL provide to you?
A. Nothing, really.
That -- I had it, at the most, five months. But I'm thinking it was probably more like three months, and that was early 1995.
Q. What services did AOL provide to you?
A. I'm not sure what services they even had.
E-mail, of course, was one that I do recall. But I didn't have a domain at that time, so I wasn't really interested in anything else beyond e-mail.
Q. We talked earlier about the lawsuit that you have with REDACTED .
A. Yes, we did.
Q. You testified that --
A. I'm sorry, it's not a lawsuit.
Q. Thank you for clarifying.
You testified you had a settlement with REDACTED Today.

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A. Yes.
Q. What was the nature of the e-mails that you received from them?
A. I think I need a clarification because I'm not sure how to answer that.
Q. Were they advertisements?
A. Oh, yes. They were all advertisements for their REDACTED .
Q. What did they advertise?
A. Dolls. Little statuettes, miniatures; things like that.
Q. And you believe they violated statutes, correct?
A. Yes.
Q. Do you remember specifically what about the e-mails violated statutes?
A. Some of it was "subject" line.
Relaying of e-mail.
That's just off the top of my head. There may have been other things.
Q. Were there problems with the "subject" lines?
A. Yes.
Q. What were the problems?
A. I don't recall.
Q. What is e-mail relay?
A. Spam filters designates the -- the SpamAssassin spam

filter designates certain e-mail is received via a relay, and they determine relays -- IP addresses, domains that are blocked per Spamhaus, Spam Cop, one of those services, SPEWS and so forth.

And they -- whenever an e-mail from one of those domains comes through that, it's flagged, and SpamAssassin apparently somehow gets that information and tags the e-mail.

Q. Do you know whether the statute prohibits e-mail relay?

A. I don't think -- if you have permission, I don't think it's prohibited. But if you're doing it without permission, I believe it is.

Q. Do you believe REDACTED was doing e-mail relay without permission?

A. If I had to guess, I would say yes.

Q. Do you know whether -- strike that.

Are you familiar with the term "opt-out link"?

A. Yes.

Q. What is an opt-out link?

A. Typically, spammers provide that, ostensively, to allow a person to -- it's a scam.

But anyway, they say that it's to allow people to opt out of -- or stop receiving communications from that particular spammer.

Q. Do you recall whether REDACTED provided an

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opt-out link?

A. They probably did. I'm guessing they did.

Q. Did you click on it?

A. No. Not to my --

Q. Have you ever --

A. Many, many times.

Q. I'm going to go back because I think we were talking over each other.

A. I interrupted you. I apologize.

Q. You testified that you don't recall whether REDACTED had an opt-out link.

A. That's inaccurate.

I wasn't -- I don't know how many of their e-mails had opt-out links, but if I had to guess, it would probably be most of them did. There may have been some without.

Q. Have you ever clicked on an opt-out link?

A. Hundreds of times. Maybe thousands of times.

Q. Were there occasions where you clicked on opt-out links and then e-mails stopped in response to clicking on the opt out?

A. There may have been.

Q. Were there occasions when you clicked on an opt-out links, requested to opt out, but e-mails continued?

A. I think that is the -- probably 95 percent of the time, that's the way it works.

Q. Please identify an opt-out link that you clicked on and requested an opt out but continued to receive messages from the provider.

A. I did so with the defendants.

Q. Which defendant?

A. Both.

Both.

Q. Adknowledge and Virtumundo?

A. Yes.

Q. You clicked on an opt-out link with Virtumundo; is that right?

A. Well, let me double -- I think I did with Adknowledge.

I know I did many, many times with Virtumundo.

Q. When was the first time you clicked on an opt-out link with Virtumundo?

A. Probably early October 2003.

Q. Where was the opt-out link located?

A. Don't recall.

I don't recall exactly where it was.

Q. Was it in an e-mail?

A. I -- I would think that it was. It could have been on their website. I visited the website. I've also looked through their e-mails.

I just don't recall where it was specifically. I could have clicked on a link that took me to a website. I just

saw it -- I'm just not certain.
Q. Are you sure that you clicked on an opt-out link through Virtumundo?
A. Oh, yes.
Q. Did you receive any kind of response from Virtumundo after you entered the opt-out information?
A. I don't know right now. That was at a time where I had opted out of many thousands of offers that had come through.
I've kept about 2,000 successful unsubscribe notices that I've received.
Q. From Virtumundo?
A. No. From -- I guess we're only talking about Virtumundo and Adknowledge.
So, no.
Q. Have you ever received an unsubscribe notice from Virtumundo?
A. I don't think I've ever received anything from Virtumundo even though I've tried to contact them many times.
Q. You allege that you, on an Internet site or otherwise, clicked on an opt-out link through Virtumundo, correct?
A. That's my belief.
Q. Do you recall whether, after you clicked on the link or entered in any information, you received confirmation?
A. I don't recall.

Q. How many times did you attempt to opt out through Virtumundo?

A. The reason why I don't recall is because I, as I said, did -- between August of '03 and the end of the year, 10- to 12,000 opt-outs and letters, complaint letters.

11- to 12,000 is probably a more accurate number.

And your clients' e-mails would have been right along with everyone else's. I have no recollection of any specific ones. I just have records that I've done it.

Q. You have records of opting out through Virtumundo?

A. Through the opt-in source for Virtumundo, yes.

Q. Do you have records of opting out through Virtumundo?

A. For them directly, no.

Q. Why didn't you maintain any records of opting out through Virtumundo?

A. I didn't know it was going to be necessary.

Q. When was the last time you attempted to opt out through Virtumundo?

A. I don't recall when that was.

Q. Was it during the pendency of this lawsuit?

A. I may have. I just don't know.

MR. NEWMAN: I'm going to start with Exhibit No. 10. The reason I'm starting with 10 is because I think that in your depositions, you used about 10, and in order to avoid confusion later when we designate exhibits for trial, I think it would be best if they're sequential.

MR. SIEGEL: That's fine.

(Exhibit No. 10 marked.)

Q. The court reporter handed you what's been marked Exhibit No. 10.

Have you ever seen this letter before?

Take time to read it.

A. Oh, okay.

MR. SIEGEL: Have you got a copy there, Counsel?

MR. NEWMAN: I'm sorry.

A. (Witness reviews document.)

Okay.

Do you need it back? Oh.

Q. Throughout this process, you'll be handed exhibits, and they are original documents that will be attached to the transcript.

A. Okay.

Q. You may keep them at your side because we'll refer to them throughout the proceeding.

At the end of today, please return those documents to the court reporter and don't take any with you because they're going to be part of the permanent record.

A. Okay.

Q. I've provided your lawyer with a copy of this document, and I will for each exhibit, and so you'll have a copy for your files.

A. Okay.

Q. Have you ever seen Exhibit No. 10 before?

A. I think I have. I think I have.

Q. What is it?

A. Just what it says. "Preservation of evidence."

Q. It's a letter that my law firm sent to your lawyer reminding your lawyer about your duty to preserve evidence, correct?

A. Yes.

Q. And you say you believe you've seen this.

A. Yes, I think I have.

Q. So you're aware of your duty to preserve evidence, correct?

A. Yes.

Q. And what steps have you taken to preserve evidence in this case?

A. I just keep stuff on my computer. Put it -- try to put it in specific folders.

Q. Have you deleted any files relating to Virtumundo or Adknowledge?

A. Not to my knowledge.

Q. Have you maintained records relating to Virtumundo and Adknowledge to the extent that you have taken any steps with respect to them?

A. Electronic records.
Q. Do you have any electronic records of attempting to opt out with Virtumundo or Adknowledge?
A. Yes, I believe I do.
Q. Have you provided those opt-out records to your lawyer to provide to us in response to discovery responses?
A. Yes.
Q. And do you know whether your lawyer has provided them to us?
A. I don't know. I think he has.
Q. What forms were the record of the opt-out requests?
A. CDs.
Q. What form were the opt-out requests; in other words, were they e-mails?
A. E-mails.
MR. NEWMAN: The videographer has indicated that he's running out of tape, so let's take a break.
A. Okay.
THE VIDEOGRAPHER: This is the end of Tape No. 1 of the video deposition of James S. Gordon, Junior. The time is now 11:53 a.m. We are off the record.
(A discussion was held off the record.)
THE VIDEOGRAPHER: This is the beginning of Tape No. 2 of the video deposition of James S. Gordon, Junior. The time is now 11:55 a.m. We are on the record.

Q. You testified that you made requests to Virtumundo, what we've discussed were opt-outs, right?

A. That I called opt-outs, yes.

Q. What is an opt-out out with respect to Virtumundo when you use that term?

A. What I attempted to do was to get them to cease sending me e-mails.

I did several things. I contacted them directly at their Whois look-up information that they provide to their registrar in case someone needs to contact them.

I directed to their legal.

To domain registration.

And maybe two for three others -- maybe more than that -- to ask them to stop.

I then put my auto responder up. And the auto responder had a cease and desist notice attached to it for anyone that sent me e-mail. Even my friends and colleagues were getting this auto response message, and they grew tired of it fast. But -- to everyone that was sending me e-mail.

So that means that they received hundreds of bounces -- not bounces, but hundreds of auto response messages to stop sending me e-mail. Every e-mail that I received had a corresponding auto responder message sent to them.

Q. You requested that Virtumundo stop sending you e-mail, correct?

A. Yes, I did.
Q. And did you this through e-mail, correct?
A. I did --
MR. SIEGEL: Objection. Asked and answered. He just went through the litany of ways that he requested them to stop.
MR NEWMAN: That's not an appropriate objection.
If counsel wishes to object to the form of the question, counsel should so do so. "Asked and answered" is not an appropriate objection, and I would like a clear record here.
I also want to make sure the witness understands the subject matter we're discussing.
Q. From time to time, I will repeat a question. I will attempt not to, and I'm certainly not trying to put you under any pressure or harass you. I just want to make sure we have a clear record.
So I'll ask the question again.
A. Okay.
Q. You asked that Virtumundo stop sending you e-mail, correct?
A. Yes, I did.
Q. And in what form did you make that request?
A. In --
Q. And just to avoid the whole asked and answered issue, you testified you did this through e-mail, right?
A. That's a part of it.

Q. How else did you request that Virtumundo stop sending you e-mail?

A. In '03, it started with trying to opt out through whatever was available. If it was a link or a web page or whatever, I tried to do it that way.

I also went to their upstream providers and sent them complaint letters -- let's say it was Cogent or someone else -- and complained to them that I was receiving e-mail.

It didn't stop with that.

I then resorted to the Whois look-up information to try to get them to stop that way.

I then went to auto responders.

And it still hadn't stopped.

So, eventually, we ended up filing a lawsuit.

Q. You testified that you clicked on a Web link; is that right?

A. That's my belief.

Q. Upon what basis do you have that belief?

A. Well, I received some successful unsubscribes, and I typically did that action in groups. I would sit down with maybe day one or -- let's say Monday's e-mails and go through them.

Then I'd sit down again maybe on Wednesday or Friday or some other date.

And I did them in groups.

Q. Did you retain the successful unsubscribes from Virtumundo?

A. No. I only retained it from EmailPrize and a few others at that date.

I didn't retain them again until -- at least, I'm guessing -- until January, February, March; in that time frame.

Q. You testified you sent Virtumundo e-mails, correct?

A. Yes, I did.

Q. And asked them to stop sending you messages?

A. Yes.

Q. Did you retain copies of those e-mails?

A. And I submitted them to you all.

Q. Are there any e-mails that you sent to Virtumundo that you haven't submitted to us in this case?

A. I don't think so.

Q. You testified you clicked on a Web link; is that right?

A. That's my belief.

Q. You responded that it is your belief.

Are you not sure whether you clicked on a Web link?

A. I did 10 -- 10-, 12,000 of them.

So I just can't be positive right now on who I sent it to. I only have a few names that I've retained.

Q. Is it possible you did not click on a Web link for Virtumundo?

A. No. Because I received so much from them that -- the major spammers, I did for sure.

And the fact that I also have upstream providers for Virtumundo means that I did first try the opt-out. That was the sequence. It was an escalation or acceleration process or whatever you want to call it. So I went to the next level each time.

Q. So you're confident you clicked on a Web link?

A. No, I'm just confident I contacted them. And if the Web link was available, I used it.

Q. But you don't know whether you clicked on a Web link?

A. To be absolutely positive, I can't say that I did because I have no evidence that I did.

Q. Did you click on a link in any e-mails you received from Virtumundo requesting that Virtumundo stop sending you messages?

A. Again, that's my belief, that I did that.

Q. How many times?

A. I don't know.

Q. Did you save any evidence or printouts of documents arising out of you clicking on those links?

A. Other than the EmailPrize and maybe one or two of those other gateways or portals.

I didn't save records to that degree during '03.

I didn't really start saving records until '04.

So I don't have any proof that I opted out at that point specifically to your client.

Q. Did you click on any links in a Virtumundo e-mail requesting not to receive messages after 2004?

A. I may have. I don't know for sure.

Q. Do you have any records of that in that regard?

A. I would have to check. Nothing comes to mind.

Q. Have you clicked on any such links in the last year?

A. I don't know. I may have.

Q. But you have no record of that?

A. I'm not going to say I don't have a record. I've kept a lot of records.

I've got maybe an e-mail repository of 3 or 4 million e-mails and ten of thousands of records. So it could be in there somewhere.

Q. You understand you have a duty to search those records to determine whether they're responsive to the discovery requests in this lawsuit, correct?

A. No, I don't understand that.

Q. You have that duty.

A. Okay.

Q. But you don't understand you have that duty; is that right?

A. No, I don't understand that. Or didn't.

Q. Do you understand that now?

A. You've explained it, yes.

Q. Are you going to make an effort to go through those e-mails and the other records you just testified about to determine whether there's documents responsive to our discovery requests?

A. Yes, I will do that.

I'll likely find more spam. But, yeah, I will do that.

Q. To whom did you address e-mails at Virtumundo requesting that they stop sending you e-mails?

A. Other than the legal department, there were several others, and I would have to refresh my memory with an actual e-mail, which I've provided to you.

Q. Did you ever receive a response?

A. Yeah, there was something sent back to me. It was kind of a form letter.

Q. Do you remember the substance of the form letter?

A. Not exactly, no.

Q. Did you produce that form letter in the scope of the discovery in this lawsuit?

A. I believe I did.

Q. Do you remember who signed it?

A. No.

Q. Other than e-mail advertisements, have you received anything from Virtumundo?

By way of example, a letter from Virtumundo in response to one of your inquiries or the like.

A. I don't believe so.

Q. Have you ever made any attempt -- strike that.

Have you ever requested to Adknowledge that it stop sending you e-mails?

A. Other than the auto responder, I don't believe I have done anything more.

I've -- I don't think I've done anything more than that auto responder.

Q. Do you believe that Adknowledge received the messages that the auto responder sent?

A. I would have to double-check. I think they did. In fact, I think I even received a few bounces from Adknowledge.

Q. Do you believe that Adknowledge received the messages that the auto responder sent?

A. Yes.

Q. Upon what basis do you base that belief?

A. Because the auto responder is virtually infallible. If you send an e-mail, it will bounce -- send something back to you.

Q. What's the process of the auto responder?

A. Don't know if you're talking about the technical part of it.

I just know that if you use it -- and I've tested it.

If you use it, it will send an e-mail message. Any time you send a message, you'll get a message.

Q. You believe that you receive messages from Adknowledge and the auto responder sent a message in reply, correct?

A. During certain windows of time, yes, that's true.

Q. Do you know whether the auto responder sent to the "reply to" address or the "from" address or both?

A. I'm not sure.

Q. How do you know Adknowledge received it?

A. It didn't bounce back.

Q. Do you know from what address the auto responder message came?

A. I'm not sure if I understand that. From --

Q. Well, your e-mail address is James@Gordonworks.com, correct?

A. No, it's Jim@Gordonworks.

Q. And if I send you a message and you hit "reply," it will come from Jim@Gordonworks.com, correct?

A. The recipient. Okay.

Q. Is that right?

A. Yes, it would.

Q. When the auto responder responds to a message, is that message from Jim@Gordonworks.com or from a different e-mail address?

A. Multiple. It was from -- I don't know how many.

Maybe all. It could have been as many as the 23, 24 that I had at that time.
I believe it was for all of the Gordonworks.
Q. There's only one "from" address in an e-mail, correct?
A. In the course -- normal course of things, yes, that's true.
Q. When the auto responder sent messages, was there only one "from" address?
A. I would have to see.
This -- without seeing something, I just -- I don't have any basis to say yes or no. I'm just not sure. I would have to see it.
Q. Do you believe that Adknowledge sent e-mails to Jim@Gordonworks.com?
A. I don't know offhand.
Q. If Adknowledge had sent e-mails to Jim@Gordonworks.com, would it have received a message from the auto responder?
A. It depends. I think in February and/or March of '04, that would have been true.
No, that would have been Virtumundo, I think, at that time.
Again, without seeing it, I'm not certain. I would have to see it.
Q. During what period of time was the auto responder

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active?

A. Most of 2004.

Q. Do you know when in 2004 you began using the auto responder?

A. I think it was February.

Q. And do you know when in 2004 you stopped using the auto responder?

A. I'm guessing October.

Q. Did you ever call Virtumundo by telephone and request that they stop sending you e-mail?

A. No.

Q. Did you ever called Adknowledge by telephone and request that it stop sending you e-mail?

A. No.

Q. Did you ever send an e-mail to any particular person at Adknowledge requesting that it stop sending you e-mail?

A. They never identified anyone in their e-mails to send it to.

Q. Did you ever send registered mail to Virtumundo or Adknowledge requesting that either stop sending you e-mail?

A. No.

Q. What did you contend were the problems with the messages that Commonwealth Marketing Group sent you?

A. I don't recall specifically.

Q. Do you believe that the messages that you received

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from Commonwealth Marketing Group violated a statute?
A. That probably was my belief at the time.
Q. But you don't remember how they violated the statute?
A. Not offhand.
Q. How many lawsuits did you file in 2003?
A. Three, because that was the first time.
Q. And we discussed each of those lawsuits, correct?
A. I think so.
Q. Did you file lawsuits in 2004?
A. I just don't recall who I filed them -- I don't know the sequence. I know that I filed 15 to 20 lawsuits. I just don't know when they were filed.
Q. 15 to 20 lawsuits over what period of time?
A. Since December of '03. I think that's the ballpark figure.
Q. To the present?
A. Yes.
Q. How many of those lawsuits have settled?
A. Probably less than -- well, less than half.
I guess maybe seven, eight, six. I'm not sure.
Q. Was money paid to you in each of those six to eight settlements?
A. There's one that I can't talk about.
But as a rule, that is the case.
Q. Have you ever dismissed a lawsuit, other than the one

against Mr. Hansson, for any reason other than an agreement with the other party to settle?

A. There's one I can't talk about.

But, again, as a rule, that was the case.

Q. There's one you can't talk about?

A. Uh-huh.

Q. Why can't you talk about it?

A. Confidentiality.

Q. You dismissed it, but it wasn't dismissed pursuant to an agreement; is that right?

A. I'm not going to talk about it.

Q. You testified that you have filed 15 to 20 lawsuits since December of 2003.

Did they all allege violations of laws governing e-mail?

A. Yes.

Q. Have you ever been to trial on any of these cases?

A. Not yet.

Something to look forward to, though.

Q. Has a court ever dismissed any of the cases upon a motion?

A. Hansson, I think, is the only case that I know of.

Q. How many lawsuits do you have pending?

A. I don't know.

Q. Have you ever been sued?

A. Yeah. Impulse Marketing Group just sued us, I think, in '05. '04, '05.
Q. Is that lawsuit in the nature of a counterclaim --
A. Yes.
Q. -- or third-party complaint or is it a separate lawsuit?
A. My understanding is that it's a countersuit.
Q. It's part of the same case as one that you brought against Impulse Marketing, correct?
A. I don't understand it from a legal term.
But I'm just guessing that they're all, part and parcel, the same.
Q. Fair response.
Is it the same judge as the case --
A. Yes.
Q. -- you brought against Impulse Marketing Group?
A. Yes.
Q. You're married?
A. Yes, I am.
Q. How long have you been married for?
A. 30 years.
Q. Congratulations. That's awesome.
A. Hard work.
Q. Have you ever been convicted of a crime?
A. Never.

I guess I should ask, what's a crime?

But in my -- to my knowledge, I have no criminal record as a juvenile or as an adult. Misdemeanor nor felony.

Q. And when you're asking for clarification, other than a traffic incident, speeding or the like --

A. Okay.

Q. -- has there been any type of --

A. No. No.

Q. Other than Impulse Marketing Group filing a counterclaim, have you ever been sued?

A. Okay. This is one -- I'm not certain how to answer that.

When there is a case of a suit and a countersuit, that's where, I guess, I'm getting hung up.

Q. Okay. I'm not trying to trick you.

A. I'm trying to understand.

Q. You are the plaintiff in the Impulse Marketing Group lawsuit, correct?

A. Yes.

Q. And they have a claim against you, which I'm calling a counterclaim, and you're not sure if that's what it is.

But there is a claim in that lawsuit that they're bringing against you, correct?

A. Yes.

Q. Is there any lawsuit that you can remember where you were named as the defendant and you weren't the plaintiff?

And my question is in all of time. It's not just limited to the past few years. If you can remember.

A. I -- I know I've been involved in legal squabbles about a couple of things. But I think it's as a plaintiff, if I recall.

I'm not sure, is the answer. I'm sure it's part of the record. If we have to do some research, I could find that.

As a plaintiff, I can think of other things, but as a defendant, nothing comes to mind right now.

Q. As a plaintiff, have you ever been involved in a lawsuit that didn't deal in e-mail marketing law violations or the like?

A. Yes.

Q. When?

THE WITNESS: Bob, how far back do we have to go with this?

MR. SIEGEL: As long as you can remember.

A. Oh, geez. I think it was 1992 or '3, I had dispute with a company I worked with about wages. And I went pro se, lost that case, and they got attorneys' fees.

That comes to mind.

Q. That was in 1992?

A. Oh, I don't know for sure. I'm just guessing. That's about the time.

It was early '90s. Could have been '91, '2 or '3.
Q. What was the name of that employer?
A. Columbia Basin Minority Economic Development Association.
Q. Any others in which you were a plaintiff?
A. There were two as The Gordon Group, small claims, and I just don't know the details right now. One for me and one against me, in terms of the judge ruling.
Q. Let's start with the first one for you.
A. I don't -- I don't remember which was which.
Q. Who was the defendant?
A. Don't know.
I don't know either of them right now. This is 20 years ago.
Q. What were the nature of the disputes?
A. Just small claims matters.
Q. Claims for what?
A. Without looking at it -- it has been out of my mind since whenever it was. 1985, '6 or '7; something like that.
Q. Any other lawsuits that you can recall?
A. No, there were probably -- that's all that comes to mind right now. If I took time to be refreshed, I probably could --
Oh, an employment discrimination complaint. 1981, I think it was. 1980. Could have been '79.

Q. What was the nature of the claim there?
A. Employment discrimination.
Q. You alleged that you were discriminated against?
A. Yes.

[START EXCERPT]

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[END EXCERPT]

Q. I'm going to suggest that we take a lunch break.
A. Okay.
Q. And we'll return after and continue questioning.
A. Okay.

MR. NEWMAN: So we're off the record.

THE VIDEOGRAPHER: The time is now 12:21 p.m. We are off the record.

(A lunch recess was taken.)

THE VIDEOGRAPHER: The time is now 1:38 p.m. We are on the record.

E X A M I N A T I O N (Cont'd)

BY MR. NEWMAN:

Q. Godaddy currently provides you services, correct?

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A. That's correct.
Q. That are their services?
A. They provide a dedicated server for me.
And on the dedicated server, I can put all kinds of software on it. There's mail, Web hosting available, for starters.
Q. What else?
A. Just other things.
If I -- I've added SiteBuilder, which is an opportunity for all my clients to build their own websites. Or other people that I know, if they want to practice building websites, they can use that.
Q. The SiteBuilder service is offered by Godaddy, correct?
A. No, it's offered by SWSoft.
Q. What's SWSoft?
A. A company that builds SiteBuilder and other applications.
The two companies coordinate the offering, though, because SWSoft has an administrative control panel that Godaddy offers to its clients.
Q. How much do you pay Godaddy each month?
A. It's done automatically and we just upped it.
I don't know. It's about $200 a month.
Q. For the $200, do you receive any services in addition

to the dedicated server?

A. Yes. There is one other. It's a technical assistance program where they go in and actually do the behind the scenes work on the server with the server.

Q. Who owns the server?

A. I guess they own it.

I believe my relationship is a lease.

Q. How do you access the server?

A. I go to my interface, the Plesk, P-L-E-S-K, and put in my password and user i.d. and can work with the administrative control panel to do what I need to do.

Q. What type of tasks do you perform via the Plesk interface?

A. Set up new e-mail accounts.

Set up new domains.

I don't really configure SiteBuilder, but I can practice sites and things like that as well.

But most of it's, you know, keeping control of -- of statistics, make sure people don't go over their limits and things like that.

Q. Go over what limits?

A. Their monthly limits in terms of bandwidth, how much bandwidth they can use and how much space they can occupy on the physical space on the server.

Q. Who is "they"?

A. My clients.
Q. What are the monthly limits?
A. I think it's 600 megabytes for bandwidth, and there's 250 megabytes for disk space.
Q. How much disk space is on the server in aggregate?
A. I think it's 120 gigabytes.
Q. How much bandwidth can you access through Godaddy for that server per month?
A. Currently, 500 gigabytes, I think, is my monthly limit.
Q. 500 gigabytes of what?
A. Of bandwidth, of traffic that they'll allow on the server.
Q. What's your limit at a single time?
A. I don't know.
Q. You believe that you have access to 500 gigabytes of data transfer per month --
A. Yes.
Q. -- through your server?
A. Yes.
Q. Have you ever used 500 gigabytes?
A. No. I haven't come close.
Q. Do you know the most you've ever used?
A. No, I don't.
Q. Is the server that you lease from Godaddy backed up?

A. Currently, no.
When I had the virtual dedicated server, that was, I believe.
Q. You don't have the virtual dedicated server now?
A. No, I don't.
Q. What is a virtual dedicated server?
A. Where I share a server with -- I don't know how many other people.
Q. The reason you're using the virtual dedicated server now is because you have simply a dedicated server, right?
A. That's right.
Q. One box that's reserved for you?
A. That's correct.
Q. Have you ever seen the box?
A. No, I haven't.
Q. Do you know what kind of computer it is?
A. They had that information. I mean, it's in my Plesk interface. I would have to go on there to actually see what type of --
It's, likely, probably a Pentium box that runs Apache or something on there.
It's a Uni- -- not a Unix -- Lenox box. Lenox software running on Microsoft -- not Microsoft, but a regular PC.
Q. Was it your decision that that computer should run

Lenox?
A. No.
Q. Whose decision was it?
A. I assume it was Godaddy.
Q. If you wanted the box to run Windows, could you?
A. I haven't asked that question.
Q. Do you know who makes the Lenox product that's on that box?
A. No, I don't.
Q. Do you have root access to the box?
A. Not for -- I'm sorry, I interrupted you.
Not for the dedicated server.
Q. The manner in which you answered that question indicates you might have root access for something else.
A. Prior to having the dedicated server, I had the virtual dedicated server up until November of last year, and that did have a provision for root access, which I never used.
Q. But not root access for the whole server, right?
A. I wouldn't think so.
No, I don't think it would be.
Q. Because other people shared that server?
A. That's correct.
Q. Have you asked Godaddy for root access to the server that you lease?
A. No, I haven't, because I had the technical assistance

program. They'll do all the work.

Q. How many domain names do you register?

A. Me personally?

Q. You personally.

A. Okay.

Q. Or Omni or Gordonworks.

A. I have three or four that I own.

And I have set up just two recently that I just advanced my brother and another friend the fee for setup, and at some point -- I'll probably end up just making it again.

But I just set up two new ones and it's currently in my name, but we'll transfer it to the them in the near future.

Q. Is Godaddy the domain name registrant?

A. Yes. Yes.

Q. Godaddy provides a DNS for your domain names?

A. Yes. My belief, that's true.

Q. You don't operate your own DNS servers, correct?

A. My understanding is that it's all managed by their technical assistance group because I have -- I've had basically no duties to do anything with that server other than to set up the software to serve the clients.

Q. You don't operate your own DNS server, correct?

A. My understanding is no, I don't.

But who knows? That's my understanding.

Q. Do you know what an IP address is?

A. Internet protocol address?
I have one. I've had three.
Q. When you say you have one and you've had three, what do you mean?
A. I'm still harking back to the virtual dedicated server. I had three assigned to me.
With this, I have one, but I understand that they're assigning another to an FTP service that I'm interested in, and I can get a third as well.
Q. Are you familiar with ARIN, the American Registry for Internet Numbers?
A. That depends on what "familiar" is.
I can look up who domains belong to.
Q. Can you look up who Internet protocol addresses belong to?
A. I don't use ARIN. I just use other applications to do look-ups.
Q. What applications?
A. I started with Sam Spade.
I've done dnstools.com.
SmartWhois.
CompleteWhois.
AllWhois.
And there are probably others that I've used.
Q. And on any of those websites that you just mentioned,

can you find out to whom an IP address is registered?

A. Usually, they -- let's see. How do I answer that?

Yes, but I believe you typically get blocks of IPs. That's my recollection, that you get blocks, who the blocks belong to.

Q. And the IP address that you testified is assigned to your server, who is that IP address registered to?

A. I'm guessing Omni.

Q. And upon what information do you base that belief?

A. Well, Omni is the one that leases, owns the server.

I guess "leases" is a more proper term.

Q. Have you ever done a search on any of the tools you've testified about earlier regarding the IP address that you believe is registered to Omni?

A. I don't recall anything right now. I could have done it sometime, but nothing comes to mind.

Q. Do you have any information other than your guess that the IP address assigned to that server is registered to Omni?

A. Please repeat that.

(The requested testimony was read.)

A. Somehow I'm not understanding that.

Q. I'll rephrase in an attempt to make it easier for you.

A. Okay. Okay.

Q. You testified earlier that there is an IP address assigned to the server that you lease from Godaddy, correct?

A. Yes.

Q. And you testified that you believe that the IP address assigned to that server is registered to Omni, correct?

A. Right now -- I'm not sure. I'm just guessing. That's just my best guess.

Q. You don't know?

A. I don't know.

Q. Have you paid any fees for an IP address with Godaddy?

A. Other than my monthly fee, I don't know if I have.

I can't think of anything else.

Q. Do you have FTP access to the server that you lease from Godaddy?

A. I don't quite understand what you mean.

I can FTP files to Gordonworks if I chose to because I've set that up.

But in terms of having an FTP site, where can go in and get a 450 megabyte file. That I haven't formally set up.

I tried to do that maybe -- about the time we filed a summary judgment motion, there was some files that I wanted to put on the Internet, and I talked with them about it.

Q. If you wished to have a copy of the hard drive in that server, could you obtain one?

A. I don't know. I've never asked.

Q. Do you have a computer that you own?

A. Yes, I do.

Q. How many?
A. I have three that I use; two for business and one for my studies.
Q. What kind of computers?
A. I built them myself. So they're no brand, I guess.
Q. Where did you learn to build computers?
A. From my 14-year-old son.
Q. You testified you use two computers for business.
A. Yes.
Q. What business is that?
A. For my Omni business.
And I use -- let's see.
The Omni business. Occasionally, I'll do my studies on that depending on -- my laptop was unavailable to me for several months. So I've done my studies as well as my business on there.
And I see it as two businesses. I see the spam business, if I can call it that, and there's also the business of Omni, which is the software development, proprietary stuff that I was mentioning earlier.
Q. What is the "spam business"?
A. The spam business involves reclaiming my domain name from spammers.
Q. How does that business operate?
A. Basically, I notify -- first, I've done a little bit

of research, and of course, I've retained attorneys.

Notifying spammers that they're violating the law, ask them to stop, ask them to not use my Gordonworks domain, and those that refuse to after as many attempts to do the things I mentioned earlier, they don't, some of them, we file lawsuits against.

Q. Does the spam business have any customers?

A. I think both of us have something in our mind when we say "customers."

I don't understand what you mean by it, but if I can just give you what I understand by that, my clients, in a manner of speaking, are customers because they have a spam problem as well.

I talk to university groups and so forth about spam. So, theoretically, some of those people could be customers in that sometimes I follow up with them and so forth.

So as far as -- that's the extent of what I'm referring to as customers.

Q. Do your customers compensate you for the spam business?

A. The agreement that I had with my customers is that the first two years of running their business, that there would be no monthly charge -- and the monthly charge in our area is about $45 to $50 a month for the same set of services -- until they got their websites up and running.

So, two years.

Q. What set of services are you referring to?

A. Well, it's strictly e-mail presently. And sometimes when there are viruses and things like that, I'll help them if they need their hard drive reformatted or something like that.

And then there are other people I can refer them to, folks that I know that are network administrators or do have specialized expertise.

Q. Did you testify that you believe e-mail services require a $40 a month charge as a market rate?

A. No. What requires that amount is the services, meaning the Web building, the Web hosting, the 250 megabytes of disk space and so forth.

I do a lot of work for them, including some of the troubleshooting that I can do with their computers.

Q. Do you believe Web building, hosting and 250 megabytes of disk space has a market rate of $40 per month?

A. In our area, yes.

Q. What is your area?

A. Tri Cities.

Q. Do you perform those services for free?

A. I said for the first two years, I would provide the services.

Q. Have you ever received any payment for those services?

A. We haven't gotten to the two years yet.

Q. Why are you doing it for free for two years?

A. That's just a choice I made.

Q. How many customers do you have?

A. 12, 15; something like that.

Q. How did you obtain those customers?

A. Technically, that answer isn't wholly correct.

There's another group that I set up the domain for, and that's a group of about 110 or -20 people that are related to GreatNorthwest-Alpha.org. That I just haven't started doing the work on. I've set up the e-mail address for anyone that wants to start, but we've not gone into actual setup of all of the --

So, presently, there are active 12 to 15 people, and those that are prospective, sometime this year, another 110 or -20 people.

Q. Will any of them pay you money for services?

A. They will offset -- yes. Yeah, they'll offset costs.

Q. How much?

A. We haven't determined that yet.

Q. And upon what information do you base your belief that they will pay you anything at all?

A. First of all, they said they would.

And they know that there is a cost involved in doing this. And that would --

Q. Doing what?

A. Setting up all of the e-mail addresses and having a monthly contract with Godaddy to provide Web hosting.
Q. Have you ever suggested that these people sign up with Godaddy directly?
A. Some of them did.
Q. Do you know why these people would turn to you for these services as opposed to Godaddy when these types of services are generally $7 a month or so?
A. Well, the fact that Godaddy didn't offer them two full free years of service might have been a reason.
Q. You testified that you have two lines of business; one you referred to as the spam business and the other is software development.
A. Yes.
Q. What's the nature of the software development business?
A. It is software development. It takes pen and paper product that I have and turns it into a Web-based application.
Q. Who is writing that Web-based application?
A. Well, we started with Meiers, Incorporated in Kennewick, M-E-I-E-R. They were helping with the demo portion of the software.
And Battelle is providing what's called a technical assistance program grant to do a lot of the work in terms of helping me learn about the documentation process, software

development cycle and all those kinds of things. So they're providing a lot of administrative support.

However, I'm considering going to them to do the whole job. The price would go up two to three times, but I think I can get the job done faster.

Q. What's the nature of the software?

A. It entails something I call vision mapping; helping to take ideas from something ethereal to a finished product.

I think there is a track that all ideas run on and I think I've identified that track.

Q. Do you pay Meiers and Battelle?

A. I have, yes. Just Meiers.

I haven't paid Battelle. It's a grant that I received through DOE, Department of Energy.

Q. Do you ever order products or services on-line?

A. All the time.

Q. What types of?

A. Mostly software, but I've ordered lots of things.

The software comes to mind immediately. 10, 12 times a year, if not more.

Q. From whom do you purchase that software or have you purchased the software?

A. The most recent, Visualware, which is a company that markets EmailTrackerPro. They market Visual Route. Visual IPTrace, it's called. Visual IPTrace. SmartWhois. Commview.

MailWasherPro.

I've ordered things like Adobe Acrobat Pro on-line through one of the academic resellers.

I order health and nutrition products all the time via the Internet.

Q. When you order these products, do you submit your e-mail address?

A. I submit -- yes, Jim@Gordonworks.

Q. And in connection with that submission, do you generally read terms and conditions?

A. Not generally.

Q. Are there terms and conditions at these websites where you submit your e-mail address?

A. I guess. I guess most of them would have it nowadays.

Q. But you've never read them?

A. Seldom. I can't even tell you which ones I've read.

Q. Why?

A. I just don't waste time doing that.

And I only submit the Jim@Gordonworks.

Q. When you submit your e-mail address and purchase software, do you ever click on a button that says "I agree" or "I accept" or the like?

A. I typically decline to receive anything from third-party marketers.

I only agree to updates.

Q. When you submit your e-mail address and purchase software, do you ever click on a button that says "I agree" or "I accept" or the like?

A. I don't click on it.

If it's already defaulted there, I probably don't change it most of the time.

Q. Have any of the companies from which you have purchased software marketed to you by e-mail?

A. No one comes to mind.

I typically go out and search for what I need, so I can't think of one offhand. Unless, again, one of those boxes was checked.

And there is one company, now that you mention that, Zone Alarm. And apparently, it has an agreement with a lot of people to send related software to me.

That's the only one that comes to mind right now.

Q. You testified you purchased Acrobat Pro, correct?

A. Yes.

Q. Did you purchase that from Adobe?

A. No, from an academic reseller.

Q. Has the academic reseller ever sent you e-mails marketing or promoting its services?

A. I would have to check my e-mail.

They may have. I get so many e-mails, I'm just not sure right now.

Q. From whom did you purchase MailWasherPro on-line?
A. I don't recall. It could have been from Tamosoft, T-A-M-O soft.
It could have been directly from Visualware.
I'm not sure who I purchased it from.
Q. Has Tamosoft or Visualware ever sent an advertisement, marketing or promotion to you by e-mail?
A. Updates, they do. Typically it's in their software. It says "time" or "an update" type stuff.
Q. You testified earlier about your definition of spam, and I believe part of that definition included the word "unwanted" or an adjective similar to that.
A. Okay.
Q. Do you believe that there are legitimate e-mail marketing pieces? In other words -- I'm going to strike that question.
A. Okay.
Q. Do you object to the receipt of any e-mail promotions or marketing or only certain e-mail promotions and marketing?
A. When there is a relationship, no, I don't object to that.
When there's no relationship, there may have been an exception or two. I just can't recall anything right now.
But as a rule, I do object when it's unsolicited.
Q. You object to all unsolicited commercial e-mail,

correct?

A. I'm not going to say 100 percent, because I'm sure there's something at some time that I may have responded to.

I just don't recall anything right now.

Q. So you believe that at some point, you received an unsolicited commercial e-mail to which you responded?

A. It's very likely that I have.

Q. Were you grateful to have received it?

A. I don't recall the emotion, but maybe I was. If I responded, there had to be some level of gratitude.

Q. You testified that you don't object to commercial e-mail when "there is a relationship."

A. That's true.

Q. What did you mean by that?

A. Well, with Tamosoft and Visualware, they have related products that developers and unaffiliated companies sell, and they want to send notices. And I've received those notices from those allied companies.

Q. You're familiar with the term "opt-in"?

A. Pardon me?

Yes.

Q. What does that term mean to you?

A. Typically, when you take an affirmative step by saying yes to -- whether it's by way of e-mail or assent to it in terms of conversation -- when you say, I agree to receive what it is that you have.

Q. Are you familiar with the term "subscribe" as applied to e-mail?

A. I think I am.

Q. What is your understanding of that term?

A. Sometimes it's the same thing.

Q. Have you ever opted in or subscribed to receive e-mail?

A. Yes.

Q. How many times?

A. I don't know. I think virtually all of them were in 2003.

Could have been 100, 150 times all told.

But it wasn't me directly. It was me on behalf of people.

For my own account, so to speak, I'm not sure how many, but it's much fewer. Maybe you can count it on a hand or two. It's fewer times.

Q. What do you mean when you testify that it wasn't you directly, it was on behalf of people?

A. No, what I meant was it was not for my own account. I asked my wife, I said, this is something out there, would you like it, because there's something you've already won or a prize you already supposedly are being offered.

And I've asked my son, I've asked a friend, and they say yes. That's what we did back in '03.

Q. Why were you asking your wife and son and friend?

A. Free makeup, $125 worth. As much as she buys? I figure, hey, if she's already won it, why not try to get the offer.

Q. So you opted in 100 to 150 times on behalf of yourself and others, correct?

A. Do we have to wait? Oh, I apologize.

Probably, yeah.

I don't have a record as to how many times, so I'm guessing.

Q. Did you ever opt in or subscribe to Virtumundo?

A. Not directly.

Q. Have you ever subscribed or opted in to Adknowledge?

A. Not directly.

Q. Did you ever opt in or subscribe indirectly to Virtumundo?

A. Well, I found out later that I was subscribed to it.

Q. Do you know whether you ever opted in or subscribed indirectly to Virtumundo?

A. Indirectly, it's possible. But not directly.

Q. Do you know whether you opted in or subscribed indirectly to Adknowledge?

A. I'm trying to figure out how that's different from what you asked me.

Q. I asked about Virtumundo. Now I'm asking about Adknowledge.

A. Oh. Okay. Wait a minute.

Virtumundo was the byproduct of signing up at EmailPrize, and they sent me a letter within 10 days that I had signed up at that particular website. Never heard of the company directly and never had a relationship with them until I got that letter saying that I had a relationship.

However, within three weeks, maybe four, I rescinded it by going back to EmailPrize and said -- basically, I opted out. I took the unsubscribe, kept a copy of that and said I didn't want what Virtumundo and all of the other spammers were sending.

Q. Who sent the letter?

A. I did the opt-out on their website. They had a link to the EmailPrize, but Virtumundo sent the e-mail acknowledgment that I was now a subscriber.

Q. When you testified "they sent me a letter," is "they" Virtumundo?

A. Yes.

Q. And after you received that letter, you contacted EmailPrize; is that right?

A. That was who I was pointed to in the e-mail.

Q. Why didn't you contact Virtumundo?

A. Because EmailPrize, I was familiar with. I wasn't familiar with Virtumundo at that time.

Q. You received a letter from Virtumundo, correct?

A. Yes.

Q. Why didn't you contact Virtumundo in response to the letter?

A. Because they were citing EmailPrize as the gateway or portal to spam.

So I wanted to go back to the source, so to speak, and unsubscribe from that source because Virtumundo wasn't the only company that started sending me spam.

Q. You testified that you haven't signed up with Virtumundo or Adknowledge directly.

A. That's correct.

Q. But you may have indirectly.

A. Yes.

Q. What is the difference?

A. Well, these people, like Home4FreeStuff and EmailPrize and those others, they claim that they have affiliates. And typically, they don't identify the affiliates, so I don't know who they're signing me up for.

Q. Does "indirectly" mean that you sign up at one source and inadvertently sign up for a different source?

A. That's not direct -- that's not exactly what I meant.

I'm just saying that these people claim alliances with all types of marketers out there, and I don't know at that

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given point who those marketers are. And that list over time migrates, changes, and all of a sudden, there are new affiliates that we're not sure about.

But I do know and do have that record that I had unsubscribed from EmailPrize, along with those others that claim that they now have the right to give my name to others.

So I unsubscribed.

Q. We talked earlier about what the word "spam" means.

Do you believe that the term "spam" can be applied to both solicited and unsolicited e-mail or does it only apply to the unsolicited kind?

MR. SIEGEL: Objection to the extent this calls for a legal conclusion.

You can answer it from your understanding.

Q. You can answer.

A. Well, when you first asked the question, I was trying to paraphrase what Spamhaus -- which has, in my opinion, the best definition of spam -- trying to paraphrase what they said.

I don't have a separate, distinct definition of it. I know what I don't like, and I don't like to receive e-mail after I ask people to stop. I basically consider everything after that point spam.

Q. Do you believe that all spam, as that term is defined by Spamhaus, is unlawful?

A. No.

Q. Do you have an understanding as to what kind of spam is lawful and what kind of spam is unlawful?

A. I have a layman's understanding, yes.

Q. What is your layman's understanding?

A. There are statutes that restrict practices such as obscuring parts of the headers, "subject" lines that have the capacity to see and things of that nature. Those are restrictions upon mailers in terms of what they can't do, is my understanding.

Q. Can a marketer send spam lawfully?

A. It appears so.

Q. And what is your layman's understanding about how a marketer could send spam lawfully?

A. To comply with the statutes in terms of not obscuring their identity and not munding, M-U-N-D-I-N-G, the headers.

Q. You allege in this lawsuit that you received e-mail from Adknowledge and Virtumundo, correct?

A. Yes.

Q. Did Adknowledge or Virtumundo obscure its identity?

A. Yes, I believe so.

Part of that belief is, I guess, demonstrated by way of our summary judgment motion.

And the other things, we've not -- I guess theories, if you will, of the case, we've not divulged them entirely.

There's been some response to your motion to compel which further delineates some of those theories or our ideas about the theories that we have.

Q. You believe that the basis for your claim that Adknowledge and Virtumundo obscured its identify is disclosed in the summary judgment motion, right?

A. No, that's just one point.

Q. What are some other points?

A. They were, I guess, elucidated in that letter.

Gosh.

Q. What letter?

A. Sorry. The response to the motion to compel that Mr. Siegel responded to.

I have a little cheat sheet which I didn't bring which talks about the various things. We could actually look at some of the e-mails and we can start going through and pointing out things, if you'd like.

Q. Are you familiar with the Informal Coalition of Private Anti-Spam Litigants?

A. Yes.

Q. What is the Informal Coalition of Private Anti-Spam Litigants?

A. In the simplest form, it's just people that sue spammers.

Q. Are you the founder of that organization?

A. What I did was -- when you say "founder," I wasn't the first to start doing this. I was Johnny-come-lately, so to speak.

However, I made a lot of the networking calls and contacts, and in that place, I guess you can say it's a founding role.

Q. Who's the founder -- strike that.

Do you know who the founder of that organization is?

A. No. Not in terms of the initial person to start these lawsuits.

Q. Do you know how many members the Informal Coalition of Private Anti-Spam Litigants has?

A. There are no members, as such.

Q. How is the coalition comprised? And I should clarify because I know that's an awkward question.

But if there's not members, who comprises the coalition?

A. Okay. Those words weren't mine. I didn't call it ICPAL. That was someone else's doing.

Just people who talked to one another.

Q. Whose doing was it, calling it ICPAL?

A. It was more my attorney's doing than mine.

Q. Which attorney?

A. Doug McKinley.

Actually, the naming is --

Q. Excuse me?

A. The naming of the organization was more his doing. I'm not sure what name I had had before, and he asked me to change it.

(Exhibit No. 11 marked.)

Q. Have you ever seen Exhibit No. 11 before?

A. Yes, I have.

Q. What is it?

A. An article from Internetnews.com.

Q. And it's about the Informal Coalition of Private Anti-Spam Litigants, right?

A. Yes.

Q. And in this article, the writer states that you're the founder of ICPAL.

But that's not correct?

A. It's not correct in that these people were doing this long before me.

Q. And the article also advises that you rejected a $40,000 settlement from Commonwealth Marketing Group.

Is that true?

I'm looking at page 2.

A. Yes, I see that page there.

THE WITNESS: Bob, is this still protected, the conversation part here?

MR. SIEGEL: Well, he's just asking you to comment on the statement in this article, not on --

A. That's then -- that's what Susan Kuchinskas said.
Q. Susan Kuchinskas, the author of the article?
A. Yes.
Q. My question is whether you rejected a $40,000 settlement from Commonwealth Marketing Group.
A. And that's what I was asking Mr. Siegel.
THE WITNESS: Are we still under that protective thing?
MR. SIEGEL: Well, I don't think that would be protected, Jim.
THE WITNESS: Okay.
MR. SIEGEL: If you recall and you can say --
A. The answer is yes, then.
Q. At some point, you settled the Commonwealth Marketing Group lawsuit, right?
A. I'm not going to talk about that.
Q. You can't tell me whether or not you settled it?
A. I can't tell you that.
Q. What did you tell the author of this article that's contained in Exhibit No. 11 about the Commonwealth Marketing Group lawsuit?
A. I don't recall what I told her.
Q. Do you know why you told her anything?
A. I'm rereading some of this.
I do recall saying that I received that amount of

e-mails, 1500 a day, and it went up to 2,000, and then on up from that.

Do I recall -- I'm not sure what the catalyst was for this particular article. It could have been some of the California folks or it could have been some of the Western Washington folks.

Somehow our names all came up in the course of conversations.

Again, I don't know the genesis of it.

Q. Who are the California folks?

A. The people named here, I think, are Joe Wagner, Dan Balsam.

And I don't know if Bill is mentioned or not here.

Those are two of the names that I just saw.

Bill Silverstein is another person in California. And I don't think he's mentioned. Of course, I'm not reading it carefully.

And then there's some Western Washingtonians also mentioned.

Q. Does the Informal Coalition of Private Anti-Spam Litigants have meetings?

And when I use the word "meeting," I mean it in the broadest sense; conference calls, Web exchange, list serves, actual inperson meetings.

A. No.

Q. What has your participation in the Informal Coalition of Private Anti-Spam Litigants been?

A. That name was probably more for the benefit of the press than anything else.

We just talk to one another from time to time. There are no formal meetings, and we did that by design. We just chose not to.

Q. Why did you choose not to?

A. It's an easier target.

Q. Target for what?

A. People like IMG that want to countersue and do scorched-earth-type stuff.

Q. IMG is Impulse Marketing Group?

A. I apologize. It is Impulse Marketing Group of Atlanta, Georgia.

Q. The article provides -- and I think you just confirmed that you stated to the reporter that you received roughly 1500 e-mails every single day; is that right?

A. That varies, though, over time.

Q. Plus or minus?

A. Plus or minus many thousands.

When I had my auto responder, I got up to 8,000 all by myself on a daily basis.

Q. And what have you done to stop that?

A. I stopped using my auto responder.

That was part of it. But the SpamAssassin filter is one of the things.

And I continue to contact network service providers who use protection services and so forth. ICANN, which is the registrar, the rural registrar, if you will, of domains.

And I've done all the little things that I know of, contact state Attorney Generals to try to stop it.

Q. Internet corporation for assigned names and number, right?

A. That's true.

Q. Who at ICANN did you contact?

A. It was by e-mail. I don't remember an individual.

Q. Did you receive a response?

A. Yes, there was some responses.

Q. But you don't remember from whom?

A. No, I don't remember a name.

Q. What did the response provide?

A. An opportunity to say whether or not the problem that I referred to them had been corrected, and I told them no, and I told them why and set a follow-up.

Q. When did you exchange e-mails with ICANN?

A. In the last three to five months.

Q. Is that exchange ongoing or has it concluded?

A. There's been a silence for about two months now, so it may be concluded.

I've not done any additional work. There are other people who I could turn in, so to speak, but I've not done anything recently.

Q. What do you hope to accomplish with ICANN?

A. According to what I understand is their charter, there are certain things they can do for people such as myself when it comes to misrepresentations.

There are a lot of companies who will -- I'm not alleging it for the defendants -- but who will falsely register domains, and that was what I was reporting to ICANN.

Q. Do you believe that Adknowledge or Virtumundo falsely registered domains?

A. They didn't, in my opinion.

Q. Have you shared any information about this lawsuit with other persons who participate in the Informal Coalition of Private Anti-Spam Litigants, other than your attorneys?

A. When you say "share," we talk and they know because there are a lot of -- there are individuals who will go to Pacer and look up stuff and they know that I'm involved in various litigation.

So share information -- they know that we're suing. They know that we had a summary judgment motion because those are things that we talk about in the normal course.

Q. What is the normal course?

A. From time to time, we call each other.